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Supreme Court of the United States

OCTOBER TERM, 1961

No. 323

CLIFFORD VAUGHAN, PETITIONER,

vs.

N. J. ATKINSON, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED AUGUST 16, 1961
CERTIORARI GRANTED OCTOBER 23, 1961

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
NORFOLK 10, VIRGINIA

Chambers of
Walter E. Hoffman
District Judge

MEMORANDUM OPINION—November 5, 1959

Burt M. Morewitz, Esquire
Attorney at Law
Newport News, Virginia

Walter B. Martin, Jr., Esquire
Attorney at Law
Norfolk, Virginia

Re: *Vaughan* v. *Atkinson, et al.*—Ad. No. 480

Gentlemen:

At the conclusion of the hearing in the above matter on October 28, 1959, it was agreed that Mr. Morewitz would submit a draft of proposed findings of fact and conclusions of law and, after further suggestions from Mr. Martin, the same would be entered by the Court. Several questions remain for determination and, by this letter, the Court is expressing its views.

Damages for Failure to Pay Maintenance and Cure

The evidence in this case justifies a finding that the respondent was derelict in its duty to pay maintenance. The libellant had forwarded to the claims and insurance manager for National Shipping and Trading Corporation an abstract of his clinical record indicating that libellant was admitted to the United States Public Health Service Hospital at Norfolk, Virginia, on March 18, 1957, and was discharged to an out-patient status on June 6, 1957. The records of the hospital reflect a strong probability of active

tuberculosis. The only investigation conducted by the respondent was to interrogate the master and chief engineer, who stated that the libellant had never complained of any illness during his four months' service as a wiper on the SS NATIONAL LIBERTY. It is admitted, however, that the master furnished the libellant a certificate to enter the Public Health Service Hospital upon libellant's discharge on March 2, 1957. Respondent made no effort to further investigate the status of libellant's claim, and apparently did not even bother to admit or deny the validity of his claim for maintenance.

[fol. 2] Such action on the part of the respondent would give rise to a claim for damages under *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371, providing that the failure to furnish maintenance has caused or aggravated an illness. In the present case, there is no evidence before the Court which would justify a finding that the failure to furnish maintenance caused or aggravated the illness. I have examined the authorities submitted by proctor for the libellant, including *The Troy*, 121 F. 901, 906; *Ran* v. *Atlantic Refining Co.*, 87 F. Supp. 853; and *Murphy* v. *American Barge Line Co.*, 3 Cir., 169 F.(2d) 61, 64. While there is some statement in *The Troy* which could possibly be construed as an allowance of damages for failure to pay maintenance, it is clear that such allowance was limited to living expenses and some compensation for the suffering which libellant endured by reason of not having the care and attention called for under the circumstances of the case. Under the evidence before the Court at this time it appears that libellant actually earned more during his out-patient status than he had earned before signing on the vessel. There is no indication of any physical or mental suffering and, in the absence of provable damages, no allowance can be made to the libellant for this cause of action.

The evidence does show, and the Court finds, that libellant was required to pay one-half of the amount recovered by way of maintenance to his proctor. This is undoubtedly a diminution of the total amount which should have been paid to libellant, but this Court knows of no authority

which would justify the reimbursement of counsel fees through the guise of an allowance for damages incident to the failure to pay maintenance.

For the foregoing reasons, the claim for damages for failure to pay maintenance will be dismissed.

The Claim for Maintenance

At the request of libellant, the Court granted a hearing on an application for interlocutory decree to require the respondent to pay the maintenance alleged to be due said libellant. This hearing was held on February 25, 1959, and on May 12, 1959, the Court entered an interlocutory decree granting the libellant maintenance at the rate of $8.00 per day as specified in his union contract for the period beginning June 6, 1957 (the date of his discharge from the hospital as an out-patient), to and including February 18, 1959, but provided that the total amount should be mitigated by the net amount earned by libellant during said period while employed as the driver of a taxi-cab. The order further provided that respondent would be required to continue the payment of maintenance at the rate of $56.00 per week, subject to a credit for any sums earned by libellant by reason of his employment as aforesaid, until such time as the libellant reached the maximum state of recovery. Libellant contends that no credit should [fol. 3] be given by reason of libellant's earnings during the time of his employment while an out-patient, but the weight of the authority appears to indicate to the contrary. The Court adheres to its previous view that respondent is entitled to a credit for the sums earned by libellant while an out-patient. It should be noted that libellant was allowed interest at the rate of 6% per annum for each week's maintenance which remained unpaid and, to this extent, the respondent was obligated to pay for its neglect in observing its duty to provide maintenance.

Proctors have stated that maintenance has now been fully paid to and including August 19, 1959. Libellant contends that he is entitled to maintenance for an additional six days, namely, August 20, 21, 22, 23, 24 and 25. The circumstances giving rise to this contention are that the

libellant was examined at the hospital on August 19, 1959, but was not then notified that he was fit for duty. He was instructed to report back to the hospital on August 25. When he reported on August 25, the hospital then notified him that he would be discharged as fit for duty as of August 19, 1959. In the opinion of the Court libellant is entitled to the additional six days' maintenance, without interest, as libellant remained an out-patient while under orders to report back on a specific date. Furthermore, the factual situation presented in this case clearly shows that the hospital had examined libellant on August 19, but had reached no conclusion as to his condition and the effect of the hospital's discharge as fit for duty was substantially one of relating it back to the date of the final examination. This ruling is not to suggest that a seaman must be officially notified when he is fit for duty, but if the seaman is directed to report back at a later date, presumably for a further examination, the seaman has the right to assume that maintenance will be continued pending a final determination of his status.

Accordingly a decree will be entered permitting the recovery of maintenance for the additional period of six days, less such sums as were earned by the libellant in his employment as a taxi operator.

Causation of Original Illness

The evidence does not firmly establish that libellant suffered from active tuberculosis but he undoubtedly had a condition which required treatment.

There is no credible testimony in this case pointing to any connection between the illness of libellant and the cause of same. There is no merit in libellant's contention that there existed any violation of 46 U. S. C. A. §673, or any provisions of the union agreement. Assuming, without finding, that such violations did exist, there is no suggestion that the violations were associated with libellant's condition. The cause of action alleging that the [fol. 4] respondent is liable for the illness of libellant is dismissed.

The Claim for Wages

It is admitted that libellant was discharged and the voyage ended on March 2, 1957, at which time libellant was paid his wages in full. He now contends that, as a matter of discretion, he is entitled to wages for a reasonable period after the termination of the voyage. He relies upon *The Michael Tracy*, 4 Cir., 295 F. 680. It is urged that this authority stands for the proposition that, in some cases, wages are allowed beyond the time of the termination of the voyage. A close analysis of this decision points to the fact that libellant was allowed maintenance which was the equivalent of wages. Nor is there any support to libellant's contention in *Seville* v. *U. S.*, 9 Cir., 163 F. (2d) 296, 298, wherein it is stated that wages are payable "at least" so long as the voyage is continued. The matter is put to rest in *Farrell* v. *U. S.*, 2 Cir., 167 F. (2d) 781, in which the Court approves the allowance of wages to the end of the voyage. On certiorari to the United States Supreme Court, the majority of this Court held that the ship owner was obligated only for the voyage on which the ship was engaged when he signed on. See *Farrell* v. *U. S.*, 336 U. S. 511. The claim for wages covering a reasonable period after the termination of the voyage is disallowed.

Proctors may use the views of the Court in preparing the findings of fact and conclusions of law. Costs will be assessed against the respondents.

Very sincerely yours,

Walter E. Hoffman, United States District Judge.

Original to Clerk

[fol. 5] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION
In Admiralty No. 480

CLIFFORD VAUGHAN, Libellant-Petitioner,

v.

N. J. ATKINSON, etc. et als., Respondents.

FINDINGS OF FACT AND CONCLUSIONS OF LAW—June 20, 1960

The Court having reviewed the pleadings as filed herein, having fully considered the evidence presented and having heard argument of proctors, and having incorporated its views in a letter to proctors dated November 5, 1959, made a part hereof, doth now make the following:

Findings of Fact

1. At all pertinent times, the SS "NATIONAL LIBERTY" was an ocean going cargo vessel, registered under the laws of the United States of America, and owned by American Waterways Corporation, a New York corporation.

2. At Newport News, Virginia, on November 26, 1956, and at Norfolk, Virginia, on January 15, 1957, libellant was employed on the SS "NATIONAL LIBERTY" as wiper, at a base wage of $315.20 per month.

3. At Norfolk, Virginia, on March 2, 1957, libellant signed off the SS "NATIONAL LIBERTY."

4. That the voyage for which libellant signed on at Norfolk, Virginia, on January 15, 1957, terminated at Norfolk, Virginia, on March 2, 1957, at which time libellant was paid all earned wages then due him.

[fol. 6] 5. Upon being discharged from the SS "NATIONAL LIBERTY" on March 2, 1957, libellant was furnished by the vessel's master a certificate to enter the U. S. P. H. S. Hospital; that on March 7, 1957, libellant was examined as an out-patient; that on March 18, 1957, libellant entered the U. S. P. H. S. Hospital at Norfolk, Virginia, and remained there as an in-patient until June 6, 1957, at which time libellant was discharged to an out-patient status; libellant forwarded to the claims and insurance manager of National Shipping and Trading Corporation an abstract of his clinical record indicating the libellant was a patient at the U. S. P. H. S. Hospital during the aforementioned dates, and that he was then an out-patient; but said abstract did not indicate the out-patient examination of March 7, 1957. The respondent paid libellant no maintenance and in this regard respondent was derelict. The only investigation conducted by respondent was to interrogate the Master and Chief Engineer, who stated that the libellant had never complained of any illness during his four months service as wiper on the SS "NATIONAL LIBERTY."

6. On May 12, 1959, this Court entered in this cause an interlocutory decree granting libellant maintenance at the rate of $8.00 per day, as specified in his union contract for the period beginning June 6, 1957, to and including February 18, 1959, but providing that the total amount paid should be mitigated by the net amount earned by libellant during this period while employed as the driver of a taxicab. The order further provided that respondent would be required to continue the payment of maintenance at the rate of $56.00 per week, subject to a credit for any sums earned by libellant by reason of his employment as aforesaid, until such time as the libellant reached the maximum state of recovery. In addition, libellant was allowed interest at the rate of 6% per annum for each week's maintenance which remained unpaid.

[fol. 7] 7. The maintenance and interest referred to in Finding No. 6 above, has been fully paid to and including August 19, 1959.

8. There is no evidence that respondent's failure to pay maintenance caused or aggravated libellant's illness. However, libellant was required to pay one-half of the amount recovered by way of maintenance to his proctor as an attorney's fee.

9. The libellant was last examined at the U. S. P. H. S. Hospital at Norfolk, Virginia, on August 19, 1959. As a result of this examination libellant was found fit for duty. However, as libellant was told to return for the result of this examination on August 25, 1959, he was not advised of his fit for duty status until that date. Libellant has not been paid maintenance by respondent for this aforementioned period.

10. The evidence does not firmly establish that libellant suffered from active tuberculosis but he undoubtedly had a condition which required treatment.

11. There is no credible evidence pointing to any connection between the illness of libellant and the cause of the same.

12. There is no merit to libellant's contention that there existed any violation of 46 U. S. C. A. 673, or any provisions of the Union Agreement.

From the foregoing Findings of Fact, the Court makes the following:

Conclusions of Law

1. This Court has jurisdiction over the subject matter [fol. 8] of this action and over the libellant and the respondent, American Waterways Corporation.

2. The libellant is not entitled to recover damages for failure to pay maintenance.

3. In addition to the maintenance already paid libellant by respondent, libellant is entitled to maintenance for an additional six days, namely, August 20, 21, 22, 23, 24 and 25, at the rate of $8.00 per day, without interest, less such sums as were earned by libellant during that period in his employment as a taxi driver which is stipulated to be

$7.73, and maintenance for the period beginning March 7, 1957, to and including March 17, 1957.

4. The libellant's cause of action alleging the respondent is liable for the illness of the libellant is dismissed.

5. The libellant's claim for wages covering a reasonable period after the termination of the voyage ending March 2, 1959, is disallowed.

Walter E. Hoffman, United States District Judge.

Norfolk, Virginia, June 20th, 1960.

Seen: To these rulings adverse to him Libellant excepts.

Burt M. Morewitz, Proctor for Libellant.

Walter B. Martin, Jr., Proctor for Respondent.

[fol. 9] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NEWPORT NEWS DIVISION
In Admiralty No. 480

CLIFFORD VAUGHAN, Libellant-Petitioner,

v.

N. J. ATKINSON, etc. et als., Respondents.

FINAL JUDGMENT ORDER—June 24, 1960

The Court, upon its Findings of Fact and Conclusions of Law filed herein pursuant to Admiralty Rule 46½ dated June 20, 1960, doth

Adjudge, Order and Decree that the libellant, Clifford Vaughan, do recover of the respondent, American Waterways Corporation, owner of the SS NATIONAL LIBERTY, maintenance for the period March 7, 1957 through

March 17, 1957, inclusive, and August 19, 1959 through August 25, 1959, inclusive, at the rate of $8.00 per day less any sums earned by libellant during said period. This award of maintenance is made without interest.

It is further Adjudged, Ordered and Decreed that all remaining causes of action alleged by libellant and set forth in his libel filed in this cause are dismissed. The respondents shall pay all taxable costs.

Walter E. Hoffman, United States District Judge.

Norfolk, Virginia, June 24, 1960.

Seen and objected to:

Burt M. Morewitz, Proctor for Libellant.

Walter B. Martin, Jr., Vandeventer, Black, Meredith & Martin, Proctors for Respondent.

[fol. 10] [File endorsement omitted]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NEWPORT NEWS DIVISION

In Admiralty No. 480

CLIFFORD VAUGHAN, Libellant-Petitioner,

v.

N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as owners and/or operators of the American SS NATIONAL LIBERTY, Respondents.

ORDER RE OPINION—August 22, 1960

The Court having been requested to file a more formal opinion, in lieu of the letter to counsel dated November 5, 1959, it is

Ordered that the memorandum attached hereto be filed in the papers of this cause as of November 5, 1959.

Walter E. Hoffman, United States District Judge.

Norfolk, Virginia, August 22, 1960.

[fol. 11]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF VIRGINIA

NEWPORT NEWS DIVISION

In Admiralty No. 480

CLIFFORD VAUGHAN, Libellant-Petitioner,

v.

N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as owners and/or operators of the American SS "NATIONAL LIBERTY", Respondents.

[Filed—November 5, 1959—Walkley E. Johnson, Clerk —Peggy L. McCulloch, Deputy Clerk]

MEMORANDUM—Filed November 5, 1959

The libellant, an American seaman, served on the respondent's vessel, the American Steamship "NATIONAL LIBERTY" from November 26, 1956, to March 2, 1957, when he was discharged from said vessel at Norfolk, Virginia, upon the termination of a voyage. On March 8, 1957, libellant reported to the United States Public Health Service Hospital at Norfolk, Virginia, for examination and was admitted to that institution as an inpatient on March 18, 1957, for treatment for suspected tuberculosis. Libellant was discharged to an outpatient status on June 6, 1957, and remained an outpatient until August 2[illegible], 1959, when he was notified that he was discharged fit for duty as of August 19, 1959.

[fol. 12]

Damages for Failure to Pay Maintenance and Cure

The evidence in this case justifies a finding that the respondent was derelict in its duty to pay maintenance. The libellant had forwarded to the claims and insurance manager for National Shipping and Trading Corporation an abstract of his clinical record indicating that libellant was admitted to the United States Public Health Service Hospital at Norfolk, Virginia, on March 18, 1957, and was discharged to an out-patient status on June 6, 1957. The records of the hospital reflect a strong probability of active tuberculosis. The only investigation conducted by the respondent was to interrogate the master and chief engineer, who stated that the libellant had never complained of any illness during his four months' service as a wiper on the SS "NATIONAL LIBERTY". It is admitted, however, that the master furnished the libellant a certificate to enter the Public Health Service Hospital upon libellant's discharge on March 2, 1957. Respondent made no effort to further investigate the status of libellant's claim, and apparently did not even bother to admit or deny the validity of his claim for maintenance. Such action on the part of the respondent would give rise to a claim for damages under *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367, 371, providing that the failure to furnish maintenance has caused or aggravated an illness. In the present case, there is no evidence before the Court which would justify a finding that the failure to furnish maintenance caused or aggravated the illness. I have examined the authorities submitted by proctor for the libellant, including *The Troy*, 121 F. 901, 906; *Ran* v. *Atlantic Refining Co.*, 87 F. [fol. 13] Supp. 853; and *Murphy* v. *American Barge Line Co.*, 3 Cir., 169 F. (2d) 61, 64. While there is some statement in *The Troy* which could possibly be construed as an allowance of damages for failure to pay maintenance, it is clear that such allowance was limited to living expenses and some compensation for the suffering which libellant endured by reason of not having the care and attention called for under the circumstances of the case. Under the evidence before the Court at this time it appears that libellant actually earned more during his out-

patient status than he had earned before signing on the vessel. There is no indication of any physical or mental suffering and, in the absence of provable damages, no allowance can be made to the libellant for this cause of action.

The evidence does show, and the Court finds, that libellant was required to pay one-half of the amount recovered by way of maintenance to his proctor. This is undoubtedly a diminution of the total amount which should have been paid to libellant, but this Court knows of no authority which would justify the reimbursement of counsel fees through the guise of an allowance for damages incident to the failure to pay maintenance.

For the foregoing reasons, the claim for damages for failure to pay maintenance will be dismissed.

The Claim for Maintenance

At the request of libellant, the Court granted a hearing on an application for interlocutory decree to require the respondent to pay the maintenance alleged to be due said libellant. This hearing was held on February 25, 1959, and on May 12, 1959, the Court entered an interlocutory decree [fol. 14] granting the libellant maintenance at the rate of $8.00 per day as specified in his union contract for the period beginning June 6, 1957 (the date of his discharge from the hospital as an outpatient) to and including February 18, 1959, but provided that the total amount should be mitigated by the net amount earned by libellant during said period while employed as the driver of a taxicab. The order further provided that respondent would be required to continue the payment of maintenance at the rate of $56.00 per week, subject to a credit for any sums earned by libellant by reason of his employment as aforesaid, until such time as the libellant reached the maximum state of recovery. Libellant contends that no credit should be given by reason of libellant's earnings during the time of his employment while an out-patient, but the weight of the authority appears to indicate to the contrary. The Court adheres to its previous view that respondent is entitled to a credit for the sums earned by libellant while an out-patient. It should be noted that libellant was allowed in-

terest at the rate of 6% per annum for each week's maintenance which remained unpaid and, to this extent, the respondent was obligated to pay for its neglect in observing its duty to provide maintenance.

Proctors have stated that maintenance has now been fully paid to and including August 19, 1959. Libellant contends that he is entitled to maintenance for an additional six days namely, August 20, 21, 22, 23, 24 and 25. The circumstances giving rise to this contention are that the libellant was examined at the hospital on August 19, 1959, but was not then notified that he was fit for duty. He was instructed to report back to the hospital on August 25. When he reported on August 25, the hospital then notified [fol. 15] him that he would be discharged as fit for duty as of August 19, 1959. In the opinion of the Court libellant is entitled to the additional six days' maintenance, without interest, as libellant remained an out-patient while under orders to report back on a specific date. Furthermore, the factual situation presented in this case clearly shows that the hospital had examined the libellant on August 19, but had reached no conclusion as to his condition and the effect of the hospital's discharge as fit for duty was substantially one of relating it back to the date of the final examination. This ruling is not to suggest that a seaman must be officially notified when he is fit for duty, but if the seaman is directed to report back at a later date, presumably for a further examination, the seaman has the right to assume that maintenance will be continued pending a final determination of his status.

Accordingly, a decree will be entered permitting the recovery of maintenance for the additional period of six days, less such sums as were earned by the libellant in his employment as a taxi operator.

Causation of Original Illness

The evidence does not firmly establish that libellant suffered from active tuberculosis, but he undoubtedly had a condition which required treatment.

There is no credible testimony in this case pointing to any connection between the illness of libellant and the cause of same. There is no merit in libellant's contention

that there existed any violation of 46 U. S. C. A. Sec. 673, or any provisions of the union agreement. Assuming, [fol. 16] without finding, that such violations did exist, there is no suggestion that the violations were associated with libellant's condition. The cause of action alleging that the respondent is liable for the illness is dismissed.

The Claim for Wages

It is admitted that libellant was discharged and the voyage ended on March 2, 1957, at which time libellant was paid his wages in full. He now contends that, as a matter of discretion, he is entitled to wages for a reasonable period after the termination of the voyage. He relies upon *The Michael Tracy*, 4 Cir., 295 F. 680. It is urged that this authority stands for the proposition that, in some cases, wages are allowed beyond the time of the termination of the voyage. A close analysis of this decision points to the fact that libellant was allowed maintenance which was the equivalent of wages. Nor is there any support to libellant's contention in *Seville* v. *U. S.*, 9 Cir., 163 F. (2d) 296, 298, wherein it is stated that wages are payable "at least" so long as the voyage is continued. The matter is put to rest in *Farrell* v. *U. S.*, 2 Cir., 167 F. (2d) 781, in which the Court approves the allowance of wages to the end of the voyage. On certiorari to the United States Supreme Court, the majority of this Court held that the shipowner was obligated only for the voyage on which the ship was engaged when he signed on. See *Farrell* v. *U. S.*, 336 U. S. 511. The claim for wages covering a reasonable [fol. 17] period after the termination of the voyage is disallowed.

Proctors may use the views of the Court in preparing the findings of fact and conclusions of law. Costs will be assessed against the respondents.

Walter E. Hoffman, United States District Judge.

Norfolk, Virginia.

Entered nunc pro tunc as of November 5, 1959.

August 22, 1960.

[fol. 18] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 19]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8269

CLIFFORD VAUGHAN, Appellant,

versus

N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as owners and/or operators of the American SS NATIONAL LIBERTY, Appellees.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. Walter E. Hoffman, District Judge.

OPINION—Decided June 6, 1961

Before Sobeloff, Chief Judge, and Soper and Boreman, Circuit Judges.

Burt M. Morewitz for Appellant, and Walter B. Martin, Jr., (Vandeventer, Black, Meredith & Martin on brief) for Appellee American Waterways Corporation.

[fol. 20] SOPER, Circuit Judge:

This appeal challenges the ruling of the District Judge in an admiralty case that the amount due a seaman for maintenance should be offset by his earnings during the period of his illness.

There is no dispute as to the facts. Clifford Vaughan served as seaman on the SS NATIONAL LIBERTY, an

American ship, from November 26, 1956 to March 2, 1957, when he was discharged at Norfolk, Virginia, upon the termination of the voyage. On January 5, 1959, he filed a libel against the ship and its owners claiming damages on two causes of action: First, that through the unseaworthiness of the vessel and negligence of the defendants he had contracted tuberculosis and, second, that he was entitled to maintenance and cure until he recovered from his illness. The first cause of action was decided against the seaman and on this appeal we are concerned only with the second cause of action.

Upon his discharge from the ship the libellant was furnished by the master with a certificate entitling him to treatment at the Public Health Service Hospital. He entered the hospital and was given treatment and was discharged as an out-patient on June 6, 1957, and continued in that status until August 25, 1959, when he was notified that he was fit for duty. The owners of the ship paid nothing to the libellant for maintenance prior to the institution of the suit. The District Judge held that this was a dereliction of duty owed to the libellant and ordered the respondents to pay maintenance at $8.00 per day with interest from June 6, 1957, when the libellant became an out-patient, until he was declared fit for duty on August 25, [fol. 21] 1959. The judge found, however, that the libellant had suffered no physical or mental injury from the failure of the respondents to furnish maintenance and that the libellant had actually earned more by driving a taxicab during his out-patient status than he had earned before signing on the vessel. Upon these facts the judge held that the libellant was not entitled to additional damages by reason of the ship's delinquency and that the amount due him for maintenance should be offset by his earnings during the interval.[1]

---

[1] The seaman made two voyages on the ship between November 26, 1956 and March 3, 1957, when he signed off at the end of the voyage. He was treated at the hospital between March 7, 1957, when he applied, and August 25, 1959, when he was discharged as cured. During most of this period he was an out-patient. By the decree of the court he was allowed maintenance for 820 days

This conclusion was in accord with recognized authority. It was held in *Wilson* v. *United States*, 2 Cir., 229 F.2d 277, that the right to maintenance and cure lies on the border line between "contract" and "quasi contract" and is sufficiently contractual so that the seaman has the duty to mitigate damages. This decision was followed by the same court in *Perez* v. *Suwanee S.S. Co.*, 239 F.2d 180, where the amount found by the court to be due to a seaman for maintenance was reduced by the amount of his earnings during the period of his incapacity.

There is nothing in the decision of the Second Circuit in *Reardon* v. *California Tanker Co.*, 260 F.2d 369, on which the libellant relies on this appeal, at variance with these holdings. In that case the seaman brought suit under [fol. 22] the Jones Act for personal injuries sustained while serving on the defendant's vessel. In the District Court defendant's counsel offered to prove that the defendant had paid the plaintiff the sum of $576.00 (at the rate of $8.00 per day) for maintenance and cure which exceeded his actual expenses for these purposes. The defendant's contention was that the excess should be credited against any award to the seaman for lost earnings. The court held that the evidence was inadmissible and instructed the jury that the plaintiff was entitled to recover for loss of wages and pain and suffering resulting from the injury but not for the cost of his room and board during the period of convalescence. On appeal it was first held that the trial court was in error in rejecting the proffered evidence, but subsequently on reargument before the full court this decision was reversed on the ground that the amount of $8.00 per day for this item had been fixed by agreement between the parties and neither party could repudiate it. It is plain that this decision did not overrule the previous decisions of the same court in the *Wilson* and *Perez* cases, supra. On the contrary, the final decision in *Reardon* expressly approved the view set forth by Judge Medina in his dissent

---

between March 7, 1957 and August 25, 1959, at the rate of $8.00 a day, amounting in the aggregate to $6560. The earnings which he was able to make during this period as a taxicab driver, without injury to himself, were offset against this sum.

to the original opinion wherein he expressly approved the decision in the *Perez* case and said that, in deducting the amount of the earnings from the award of maintenance in that case, the court did no more than reaffirm the well settled principle that the purpose of maintenance and cure is to make the seaman whole and that if what he earns is added to the allowance he will get something more than he is entitled to.[2]

[fol. 23] Although the seaman in the instant case suffered no damages from the failure of the respondent to pay maintenance until ordered to do so by the court, he was obliged to pay attorney's fees in the prosecution of the suit. On this account he urges that he should be allowed an amount to cover this expense in the judgment of the court. There is, however, no authority for such procedure. The general rule is that in suits for breach of contract counsel fees may be allowed to the plaintiff if he can show that defendant's breach of contract has caused litigation against third parties in which the plaintiff has been obliged to secure the services of counsel, but the rule does not deal with attorney's fees paid by the plaintiff in his suit against the defendant himself for breach of contract. 5 Corbin on Contracts §1037; Restatement of Contracts, Vol. 1, §334; 15 Am. Jur., Damages, §142; *McGaw* v. *Acker Merrill & Condit Co.*, 111 Md. 153, 160. It was early held that counsel fees are not allowable to the gaining side in admiralty beyond the costs and fees fixed by statute. *The Baltimore*, 8 Wall. 377, 392; *Tullock* v. *Mulvaine*, 184 U.S. 497, 511.

Affirmed.

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[2] In *Yates* v. *Dann*, D. C. Del., 124 F. Supp. 125, 141, the propriety of setting off earnings against maintenance was not specifically discussed; but the District Judge cut down a claim for maintenance from $18,206 to $2828 because the seaman had been awarded damages for past and future loss of wages. It was said that cumulative awards are improper. In reviewing the decision the Court of Appeals held that in principle this decision was correct. See 223 F.2d 64, 67. The decision is in harmony with the authorities cited in the text. Damages awarded for loss of wages caused by injuries were there taken into consideration in computing the claim for maintenance, while in the pending case wages actually earned by the seaman without injury to himself were offset against the claim for maintenance.

[fol. 24] SOBELOFF, Chief Judge, dissenting:

Even more than the result in the immediate case, the tendency of the court's decision and its potential impact upon future cases give me concern. The holding carries ominous implications for the future of the ancient right of maintenance and cure.

Reliance is placed upon two decisions in the Second Circuit which are inconsistent with each other and which, in any event, fail to apply the proper standard in determining the right to maintenance and cure. For reasons to be stated, I prefer the rule announced by the Third Circuit in *Yates* v. *Dann*, 124 F. Supp. 125 (D.C. Del., 1954), aff'd on this point 223 F.2d 64 (3rd Cir., 1955).

We are dealing here with no abstract question, but with a legal issue arising upon judicially established facts. We begin with the District Court's unchallenged finding that from June 6, 1957, when Vaughan was discharged as an in-patient of the United States Public Health Service Hospital and given out-patient status, until August 25, 1959, when he was pronounced fit for duty, he was entitled to maintenance. The owner was duly notified and it is undisputed that a copy of the hospital record was sent by registered mail to its insurance carrier. Whether the plaintiff was suffering from active tuberculosis, as suspected, was not definitely determined, but the significant finding of the District Court was that "he undoubtedly had a condition which required treatment."

The validity of this explicit finding which is the basis of the seaman's claim for maintenance was at no time contested. It has not been suggested that maximum re-[fol. 25] covery was attained earlier than August, 1959, the date adopted by the District Court, nor is it asserted that the plaintiff was earlier fit to perform seaman's duties. Nevertheless the shipowner, who knew of the man's condition, simply withheld payments for maintenance for this long period, as well as the shorter period from March 7, 1957, to March 17, 1957, when also Vaughan was an out-patient. The District Court adjudged that in so withholding all maintenance the shipowner was derelict in its duty to the seaman. Neither in the District Court nor here was

any attempt made to defend or justify this dereliction, but a reduction in the amount of maintenance was sought and obtained by the owner on account of Vaughan's earnings as a taxicab driver during the many months of his conceded need for treatment and incapacity for seaman's duty. It is noteworthy that the amounts earned from the operation of the taxi in no week equalled either the wages which Vaughan earned as a seaman or the contractually fixed maintenance allowance.

The only penalty the owner suffers for this callous violation of its duty is that 6% interest has been added to the accumulated liability. By contrast, the effect of the shipowner's withholding of payments and forcing court action, has been to subject the plaintiff to substantial expense for counsel fees.[1] This circumstance is disregarded in making the award. Also, as the afflicted plaintiff was unable to demonstrate and calibrate the effect of his being compelled under economic pressure to sustain himself by part-time taxi driving, no claim for aggravation of his condition has [fol. 26] been asserted against the employer for delaying the payments due.[2]

We have not been cited precedents authorizing reimbursement for even reasonable counsel fees, and not even in a case like this where the consequence of the owner's dereliction bears heavily on the plaintiff.[3] On the other

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[1] The record shows that the attorney charged the seaman 50% of the award. I express no opinion on the reasonableness of the charge, as the majority does not deal with this question.

[2] Suit for aggravation of the physical condition can avail in only the limited number of cases where it is possible to demonstrate aggravation. In the vast majority of cases where maintenance benefits are unjustifiably withheld it will be unlikely that such aggravation can be satisfactorily proved or disproved, yet considerable hardship may have been inflicted on the sick or injured seaman. An award of interest, months or years later, cannot possibly be an adequate measure of redress in such cases.

[3] Despite the absence of recent specific holdings on this question, a reasonable argument can be made on principle and authority for the award of counsel fees here. It has been said that while admiralty courts lack equity jurisdiction, they may apply equitable

[fol. 27] hand, the cases cited for the proposition that there may be no reimbursement for legal fees are from other areas of litigation where there is not the strong pol-

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principles. Gilmore and Black, The Law of Admiralty, pages 37, 38.

In equity, in exceptional cases where it has been deemed essential to the doing of justice, counsel fees have been allowed. Notably, in this circuit, Chief Judge Parker, upholding the award of a counsel fee against a labor union to a Negro who was compelled to bring suit to redress discriminatory conduct, wrote:

> "* * * Ordinarily, of course, attorneys' fees, except as fixed by statute, should not be taxed as a part of the costs recovered by the prevailing party; but in a suit in equity where the taxation of such costs is essential to the doing of justice, they may be allowed in exceptional cases. The justification here is that plaintiffs of small means have been subjected to discriminatory and oppressive conduct by a powerful labor organization which was required, as bargaining agent, to protect their interests. The vindication of their rights necessarily involves greater expense in the employment of counsel to institute and carry on extended and important litigation than the amount involved to the individual plaintiffs would justify their paying. In such situation, we think that the allowance of counsel fees in a reasonable amount as a part of the recoverable costs of the case is a matter resting in the sound discretion of the trial judge. * * *" *Rolax* v. *Atlantic Coast Line R. Co.*, 186 F.2d 473, 481 (4th Cir., 1951), and cases there cited.

For an application of the doctrine in an admiralty case, see opinion of Justice Story, in *The Apollon*, 9 Wheat. 362, 379 (1824), where a counsel fee was awarded to a party who was put to expense in recovering demurrage of a vessel wrongfully seized, as well as other damages occasioned by the seizure. *The Apollon* has been cited with apparent approval by Mr. Justice Frankfurter writing for the majority in *Sprague* v. *Ticonic Bank*, 307 U.S. 161 (1939). See his footnote 2. In light of the discussion in *Sprague*, *supra*, it would appear that *The Baltimore*, 8 Wall. 377 (1869), although it has been many times cited for the contrary proposition, is really not controlling as to costs "as between solicitor and client" which are in issue here. See also I Am. Jur. Admiralty §139 where, on the authority of *The Apollon*, it is stated:

> "It is the common course of the admiralty to allow counsel fees, either in the shape of damages or as part of the costs."

icy of the law that we have here, to avoid oppression of sick and impecunious seamen.[4]

However, if we are powerless to award counsel fees, or penalties, to do full justice, it becomes all the more imperative not to give undue favor to those who knowingly and wilfully breach the obligation of maintenance by making their improper conduct safe and even profitable.[5]

The first of the cases relied on by the majority, *Wilson* v. *United States*, 229 F.2d 277 (2nd Cir., 1956), is dif- [fol. 28] ferent from our case. Wilson obtained work as a relief engineer on ships in port, doing much the same work he had done for the defendant. Unlike the *Wilson* case, there is no intimation here that Vaughan was fit for work on a vessel at any time before August, 1959. Moreover, the language of the *Wilson* case, which is made the premise of the majority opinion, that "maintenance and cure lies on the borderline between 'contract' and 'quasi-contract' and is sufficiently contractual so that the seaman has the duty to mitigation damages" is in direct conflict with the opinion of Justice Cardozo in *Cortes* v. *Baltimore Insular Line*, 287 U.S. 367 (1932), and with the holding of the Third Circuit in *Sims* v. *United States of America War Shipping Adm'n*, 186 F.2d 972 (3rd Cir., 1951), cert. den. 342 U.S. 816, where Judge Goodrich said:

> "This obligation for maintenance and cure is, as Mr. Justice Cardozo says, 'imposed by the law itself as one annexed to the employment * * *. The duty

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[4] For the withholding even a portion of a seaman's wages a severe sanction is provided in the law by way of an award of two days' pay for each day that payment is withheld. The underlying policy (in respect to wages) would seem to justify a similar rule in the instance of an unwarranted retention of maintenance. However, the law with which we are here concerned does not go so far and we may not supply a penalty provision to give symmetry to the law.

For withholding benefits when due under the Longshoremen's and Harbor Workers' Compensation Act that Act does make provision for penalties. 33 U.S.C.A. §914.

[5] I do not intimate that if the seaman were permitted to recover reasonable counsel fees, his incidental earnings during convalescence could then be offset against his maintenance.

> • • • is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties.' Cortes v. Baltimore Insular Line, 1932, 287 U.S. 367, 371-372, 53 S. Ct. 173, 174, 77 L.Ed. 368. It is no more a contract than the obligation of a husband to support his wife is one of contract. Each arises out of a relationship voluntarily entered into. But these duties are imposed by the law as an incident to the relationship, not a matter of contract. We do not think, therefore, that the usual rules of damages for breach of contract to pay money are applicable." 186 F.2d at page 974.

See also Gilmore and Black, The Law of Admiralty, page 257.

[fol. 29] The opinion of this court, like that of the court in *Wilson*, assumes that what is involved here is an ordinary contract, that the relief sought is damages for a breach of contract and that the rule of mitigating damages applies. This is at variance with the above language of Justice Cardozo speaking for the Supreme Court. The action for maintenance and cure is not one for damages. See *Pacific Co.* v. *Peterson*, 278 U.S. 130, 136-139 (1928). See also *Aguilar* v. *Standard Oil Co.*, 318 U.S. 724, 730-731 (1943).

The other Second Circuit case upon which the majority relies is *Perez* v. *Suwanee S.S. Co.*, 239 F.2d 180 (2nd Cir., 1956). There the court sets off against maintenance a convalescing seaman's earnings from employment as a dishwasher but ignores the dissimilarity of the work and the incapacity of the plaintiff to perform as a seaman—the features it had been at pains to point out in the *Wilson* case.

The theory of the *Perez* case is, I submit with deference, contrary to the spirit and doctrine of maintenance and cure which is deeply rooted in the admiralty law. See: *Harden* v. *Gordon*, 11 Fed. Cas. 480, Case No. 6,047 (C.C.D. Me., 1823); *Reed* v. *Canfield*, 20 Fed. Cas. 426, Case No. 11,641 (C.C.D. Mass., 1832). Moreover, the course of decision in the Second Circuit strongly suggests that that court has not yet spoken its final word on this point. See *Reardon*

v. *California Tanker Company*, 260 F.2d 369 (2nd Cir., 1958).

The correct rule, I think, is to treat earnings during convalescence as wholly irrelevant, since Vaughan's right to maintenance and cure has been established in accordance [fol. 30] with the governing Supreme Court decisions. See: *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525 (1938); *Farrell* v. *United States*, 336 U.S. 511 (1949).[6] Here the earnings during convalescence should be treated as having no more relation to the right to maintenance and cure than the relief payments received by the seaman in another Second Circuit case, *Evans* v. *Schneider Transportation Company*, 250 F.2d 710 (2nd Cir., 1957). This is not unlike the "collateral source" rule recently applied by us in *Price* v. *United States*, 288 F.2d 448 (4th Cir., 1961), for Vaughan's earnings have no more to do with maintenance and are as collateral to maintenance as the civil service benefits were to damages in that case, or the insurance in *United States* v. *Brooks*, 176 F.2d 482 (4th Cir., 1949). Whether an employer's breach of its duty to provide maintenance throws the seaman on public relief or forces him to work while ill and still in need of treatment, the employer should not gain an advantage from his wrong. Maintenance is not designed to restore lost earnings, and the right to maintenance should be unaffected by incidental earnings ashore while the sailor is a patient under treatment and unfit to do seaman's work.[7]

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[6] Cf. *Bradt* v. *United States*, 221 F.2d 325 (2nd Cir., 1955), where a seaman suffering from tuberculosis returned to maritime school on a full-time basis, and he was held entitled to recover for maintenance and cure as he was still undergoing curative treatment.

[7] See also *Jones* v. *Waterman S.S. Corporation*, 155 F.2d 992 (3rd Cir., 1946). There an injured seaman was permitted to recover maintenance and cure from his employer, although in a previous action against a third party tortfeasor, which ended in settlement, he had sought to recover damages which included "substantially all the items recoverable by Jones as maintenance and cure and wages." 155 F.2d at page 995. See also discussion at page 996.

True, in a suit under the Jones Act only such wages may be recovered as the plaintiff has lost by reason of the in- [fol. 31] jury, but this is not such a suit. Likewise in a suit for wages alone, to recover for an unexpired period of a shipping contract, the employer could conceivably assert that the seaman had a duty to minimize his damages by re-shipping as soon as possible after his illness. In such circumstances the mitigation rule might be appropriate. Also it may be granted that the nature and extent of a plaintiff's earnings might be evidence to support a conclusion that there was in fact no further need for treatment and that therefore the right to maintenance has terminated; but on this record no such finding was made or even proposed. The contrary finding was not appealed from and is not complained of.

The Court's opinion makes reference to the provision in the union contract requiring the employer to pay $8.00 per day as maintenance. This provision will be read in vain for any suggestion that there may be a set-off of any kind from the allowable maintenance. On the contrary, it unqualifiedly entitles the seaman to the payment of weekly maintenance notwithstanding the considerations that have here been imported into the case.[8] The express requirement of the contract is that maintenance shall be paid when due, promptly and without making it necessary to resort [fol. 32] to litigation. Here the employer violated every aspect of this protective provision.[9]

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[8] Article II Section 13 of the union contract reads:

"Section 13. Maintenance and Cure. When a member of the Unlicensed Personnel is entitled to maintenance and cure under Maritime Law, he shall be paid maintenance at the rate of $8.00 per day for each day or part thereof, of entitlement. The payment due hereunder shall be paid to the man *weekly*. This payment shall be made *regardless* of whether he has or has not retained an attorney, filed a claim for damages, or taken any other steps to that end and irrespective of any insurance arrangements in effect between the Company and any insurer." (Emphasis supplied).

[9] It must be understood, of course, that the seaman's rights are not restricted to the union contract, since the duty to provide maintenance and cure, as previously noted, "is one annexed by

I would prefer to follow the rule laid down in *Yates* v. *Dann*, 124 F. Supp. 125, 140 (D.C. Del., 1954), and expressly approved on appeal by the Third Circuit, 223 F.2d 64, at page 67.[10] There, as here, the seaman returned to work while still under out-patient treatment by the Public Health Service. Although earnings were permitted to mitigate the wages payable as part of his damage award, yet his right to maintenance and cure was held to continue during the period in which he engaged in such work, undiminished by any earnings in that period. The court's holding was that a seaman was not to be penalized where he had not been discharged as an out-patient and should have been receiving maintenance but the employer withheld payments and the seaman returned to work from time to time.[11]

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law to a relation, and annexed as an inseparable incident without heed of any expression of the will of the contracting parties." *Cortes* v. *Baltimore Insular Line*, 287 U.S. at page 372. With or without a union contract, the maritime law should tolerate no dilution of the remedy by allowing a set-off of earnings against maintenance and cure.

[10] The case was remanded for reasons unrelated to the present question.

[11] In *Yates* v. *Dann*, *supra*, the District Court did not reduce the libellant's maintenance award by the amounts earned by him while still under treatment as an out-patient, and plainly did not consider such a reduction proper, for it said that a seaman should not be thus "penalized." 124 F. Supp. at page 140. That this was the court's view is further demonstrated by the manner in which it framed the issue as to maintenance and cure. See 124 F. Supp. at page 129.

From the Court of Appeals' interpretation of the lower court's opinion, it is clear that the reason the maintenance award had been diminished in the District Court from $18,205 to $2,821 was that elements of maintenance had been included in the recovery of damages under the Jones Act. The libellant was demanding maintenance, not only as part of the wage award under the Jones Act, but also in a separate claim for maintenance, and objected to a reduction of the maintenance award in an amount corresponding to the maintenance included in the Jones Act award. It was this duplication, insisted upon by the libellant, that was condemned, for certainly the shipowner should not be subjected to a double recovery for *maintenance*. Equally certain is it that

[fol. 33] When a shipowner genuinely believes that the seaman is no longer in need of maintenance and cure he is not without means of protecting himself in an orderly fashion. The Public Health Service Hospitals, so far as I am aware, are not notoriously partial to seamen. The employer may have the seaman re-examined from time to time to ascertain his condition. He should not be permitted and emboldened to act unilaterally, denying maintenance to one under treatment as an out-patient. If, despite his awareness that the right to maintenance exists, the employer elects to ignore his plain legal duty, the court should not tell him that he may do so with impunity, even with possible gain. The shipowner is not entitled to assurance that if his pressure on the seaman fails the shipowner will suffer no disadvantage, while if it succeeds he will harvest the fruits of the sick man's labor though it may visit upon that man serious hardship short of demonstrated aggravation of the illness.

[fol. 34] In summary, I find no sufficient warrant for a rule that rewards an owner's recalcitrance by automatically crediting him with earnings from part-time work ashore to which a sick man may be driven by the goad of hunger. Inevitably such a holding will serve as an inducement to owners, not only in doubtful cases, but even where, as here, no question was or could be raised as to the right to maintenance, to exert economic pressure on seamen to force them to work regardless of consequences to health.[12] This

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the Court of Appeals did not hold, just as the District Court did not hold, that the shipowner was entitled to a credit for earnings against his liability for maintenance and cure. In light of the Court of Appeals' opinion, it would appear, therefore, that the District Judge used the term "wages" to include maintenance as well. Thus, as I read the direction of the Third Circuit to the District Court, duplicate awards against the owner for maintenance were to be avoided, and at the same time no credit for incidental earnings during convalescence was sanctioned.

See also *Hanson* v. *Reiss Steamship Company*, 184 F. Supp. 545, 549-550 (D.C. Del., 1960), where citing *Yates* v. *Dunn*, *supra*, a maintenance award was not reduced by the amount of the seaman's earnings from work on a fur farm during convalescence.

[12] Courts will not fail to take judicial notice of the universally recognized fact that rest is an important therapeutic measure for patients suffering from tuberculosis and other pulmonary ailments.

could not be squared with what Justice Stone, citing many cases, called "the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards." *Calmar S.S. Corp.* v. *Taylor*, 303 U.S. 525, 529 (1938).

If the rule of *Yates* v. *Dann, supra*, enunciated by the Third Circuit, is considered defective in permitting a sick or injured man to retain sums he has earned during convalescence when maintenance was admittedly payable but not paid, it is certainly a lesser defect than that embodied in the competing rule of the Second Circuit, which by turning such earnings over to a defaulting employer who presents no excuse for his default, offers temptation to other employers to practice delay and harshness.

[fol. 35]

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8269

CLIFFORD VAUGHAN, Appellant,

vs.

N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as owners and/or operators of the American SS NATIONAL LIBERTY, Appellees.

DECREE—June 6, 1961

Appeal From the United States District Court for the Eastern District of Virginia.

This Cause came on to be heard on the record from the United States District Court for the Eastern District of Virginia, and was argued by counsel.

On Consideration Whereof, It is now here ordered, adjudged and decreed by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

Morris A. Soper, Herbert S. Boreman, United States Circuit Judges.

I dissent: Simon E. Sobeloff, Chief Judge, Fourth Circuit.

[Filed—JUN 6 1961]

R. M. F. Williams, Jr., Clerk.

July 8, 1961, petition of appellant for stay of mandate filed.

[fol. 36] Clerk's Certificate to foregoing transcript (omitted in printing).

[fol. 37]

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 23, 1961

The petition herein for a writ of certiorari to the United States Court of Appeals for the Fourth Circuit is granted, and the case is transferred to the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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IN THE

Supreme Court of the United States

OCTOBER TERM — 1961

No. 323

CLIFFORD VAUGHAN
Petitioner

v.

N. J. ATKINSON, etc., et als
Respondents

RESPONSE TO PETITIONER'S PETITION FOR WRIT OF CERTIORARI

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APPENDIX

Memorandum Opinion by District Judge Hoffman 1a

IN THE

Supreme Court of the United States

OCTOBER TERM — 1961

CLIFFORD VAUGHAN
Petitioner

v.

N. J. ATKINSON, etc., et als
Respondents

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

American Waterways Corporation, owner of the American Steamship NATIONAL LIBERTY, files herewith its brief in opposition to the petition for writ of certiorari heretofore filed by Clifford Vaughan.

CITATIONS OF OPINIONS BELOW

The memorandum opinion of the District Court printed in the Appendix is unreported at this printing. The opinion of the Circuit Court of Appeals is also unreported at this printing, but is set forth fully in the Appendix of the petition of Clifford Vaughan.

QUESTIONS PRESENTED

I. WHETHER SHIPOWNER IS ENTITLED TO HAVE MAINTENANCE DUE SEAMAN MITIGATED BY SUMS EARNED BY SEAMAN DURING PERIOD OF OUT-PATIENT TREATMENT WHERE SEAMAN IS ABLE TO WORK WITHOUT INJURY TO HIS HEALTH AND WITH CONSENT OF ATTENDING PHYSICIANS.

II. WHETHER SEAMAN IS ENTITLED TO DAMAGES OTHER THAN INTEREST WHERE COURT FINDS SHIPOWNER WAS DERELICT IN NOT PAYING MAINTENANCE DUE SEAMAN BUT WHERE THE FAILURE TO PAY SAID MAINTENANCE HAS IN NO WAY AGGRAVATED SEAMAN'S ILLNESS OR AFFECTED HIS PHYSICAL OR MENTAL CONDITION.

FACTS

The statement of facts as set forth on pages 3 and 4 of petitioner's petition are correct insofar as they are stated. To the facts as stated we should like to add the following facts: (1) The NATIONAL LIBERTY was the first vessel on which petitioner had ever served as a seaman. For several years prior to signing on the NATIONAL LIBERTY on November 26, 1956, the petitioner had worked as a taxi driver, the same employment that he obtained during his out-patient treatment. (2) The petitioner was advised by his attending physicians that it would be permissible for him to work as a taxi driver during his out-patient treatment. (3) That even following the District Court's Interlocutory Decree of May 12, 1959, wherein the petitioner was awarded maintenance at $8.00 less any amounts earned, the petitioner continued to work as a taxi driver and (4) that petitioner's physical and/or mental condition were in no way affected by his working during his out-patient treatment.

ARGUMENT

I. THERE IS NO CONFLICT AMONGST THE CIRCUITS AS TO THE BASIC PROPOSITIONS OF LAW SET FORTH BY THE COURT BELOW.

The decision in the case of *Jones v. Waterman S. S. Corp.*, 155 F 2(d) 992 is not concerned with either of the issues raised in the case at bar. The Jones case, *supra,* is concerned with the basic proposition that a seaman who falls sicks on a vessel is entitled to maintenance and cure so long as his need continues or until he reaches maximum cure. The case of *Yates v. Dann,* 223 F 2(d) 64, a more recent Third Circuit case and heavily relied on by petitioner, does not stand in direct opposition to the decision of the Court below in this case as petitioner would wish the Court to believe. The *Yates* case, *supra,* stands for the basic proposition that employment of a seaman while undergoing out-patient treatment does not per se cut off his right to maintenance payments. To this basis rule of law we fully subscribe. However, the *Yates* case, *supra,* is not concerned with the two questions before this Court.

Nor can we find any inconsistency between the decision of the Second Circuit in *Evans v. Schneider Transportation Company*, 250 F 2(d) 710 and *Perez v. Suwanee Steamship Co.*, 239 F 2(d) 180. In fact, in the *Evans* case, *supra,* Perez, *supra,* is cited on page 713 for the basic holding in the case, that a seaman cannot recover maintenance and cure in addition to loss wages for the same period of time. Likewise, the case of *Bradt v. U. S.*, 221 F 2(d) 325, is in no way in conflict with *Perez, supra,* In *Bradt, supra,* the Court merely held that Bradt's enrollment at Maritime School as a student should not prejudice his recovery for maintenance and

cure. This case is in conformity with the decision in *Yates, supra*, but has no bearing on the two questions raised in the case at bar.

The case at bar is not unlike the case of *Wilson v. United States*, 229 F 2(d) 277, wherein the Court allowed the seaman $8.00 per day for maintenance while an out-patient from the U. S. P. H. S. Hospital at Baltimore, Maryland, mitigated by whatever amount the seaman earned during the period in question. For days the seaman did not work, he was allowed $8.00 per day just as Judge Hoffman permitted in the case at bar. As was stated by the Court in the *Wilson* case, supra, at page 281; the duty to pay maintenance and cure:

> ". . . is sufficiently contractual so that the seaman has the equivalent of the so-called 'duty' to mitigate damages."

And as was stated in *Warren v. United States*, 75 F. Supp. 836, at page 838:

> "In short, since the seaman's right is a species of the generic right of obligees of employment contracts, he like other promisees of employment contracts is entitled to recover only such losses of wages, board and lodging as in the exercise of due diligence as he could not avoid."

And as the Court states in *Perez v. Suwanee Steamship Co., supra*, at page 181, in connection with a seaman's claim for maintenance and cure:

> "We cannot, however, agree with the refusal to deduct from the award the wages earned by the plaintiff as dishwasher during the period of incapacity."

In the Court below the libellant's proctor placed great emphasis upon the Second Circuit's opinion in *Reardon v. California Tanker Co.*, 260 F 2(d) 369, as did dissenting Chief Judge Sobeloff. However, that case is clearly distinguished from the case at bar and the cases cited above in that *Reardon, supra,* the libellant did not seek a recovery for maintenance and cure, but sought only to recover damages for personal injury under the Jones Act, 46 U. S. C. §688. It was not the intention of the Second Circuit in *Reardon, supra,* to reverse its previous holdings cited above in the *Perez* case, *supra*, and the *Wilson* case, *supra.* This is clearly stated by Circuit Judge Waterman in his concurring opinion set forth at page 376 of the *Reardon* case, *supra,* at page 377:

> "Reardon sought no adjudication by the district court respecting the sufficiency of the $8.00 a day allowance, or the adequacy of the 72-day duration of these $8.00 daily payments. The district court held that these maintenance payments had no application to damage claims asserted under the Jones Act, the claims that Reardon did present to it for adjudication. It held that inasmuch as the libellant had not sought any allowance for maintenance and cure from the Court, the respondent could not show any over-allowances it may have made out of court therefor.
>
> "Lest we create further confusion, we should not attempt to ascribe further reasons to support our affirmance than those the court below acted upon. Where the seaman has included a prayer in his libel for the granting of an allowance for maintenance and cure we have permitted shipowners to put in defense looking toward reductions of the amount claimed. *Perez v. Suwanee S.S. Co., supra., Wilson v. U. S.,* 2 Cir, 1956, 229 F (2d) 277, where

Judge Frank said of the nature of the claim for allowance for maintenance and cure, "it is sufficiently 'contractual' so that the seaman has the equivalent of the so-called 'duty' to mitigate damages.' Supra at page 281. And where the seaman has expended nothing for the maintenance he seeks the court to allow him shipowners heretofore have been permitted to show it, thereby preventing the seaman from recovering anything. *Johnson v. U. S.*, 1948, 333 U. S. 46, 50, 68 St. Ct. 391, 92 L. Ed. 468; *Field v. Waterman S. S. Corp.*, 5 Cir., 1939, 104 F (2d) 849; *Stankiewicz v. United Fruit S. S. Corp.*, 2 Cir. 1956, 229 F (2d) 580, 581; *Williams v. U. S.*, 228 F (2d) 129, 134, certiorari dei., 351 U. S. 986, 76 S. Ct. 1054, 100 L. Ed. 1499, The PAY MEAD, 9 Cir., 1937, 88 F (2d) 144. By our present decision I would not wish it understood that the decisions I mention are no longer applicable in this Circuit." (Italics added for emphasis)

II. WHERE SHIPOWNER'S FAILURE TO PAY SEAMAN MAINTENANCE DID NOT AGGRAVATE SEAMAN'S ILLNESS THE SEAMAN IS NOT ENTITLED TO DAMAGES OTHER THAN INTEREST ON EACH DAY'S MAINTENANCE FROM THE DAY THE SAME BECAME DUE.

The District Court stated in its opinion of November 5, 1959 (page 2a, this Appendix):

> ". . . in the present case there is no evidence before the Court which would justify a finding that the failure to furnish maintenance caused or aggravated the illness. . . . . There is no indication of any physical or mental suffering. . .".

Thus, Judge Hoffman concluded (at page 2, Appellant's Appendix):

> ". . . in the absence of provable damages, no

allowance can be made to the libellant for this cause of action."

In the case at bar, the fact is undisputed that the only damage sustained by libellant as a result of respondent's failure to pay maintenance was an attorney's fee. In this regard, libellant's position is no different than other litigant who seeks to recover on a note, open account or other contractual obligation. In all of the last instances cited, the most a successful plaintiff would be permitted to recover would be the principal amount due plus interest. In no instance would the plaintiff be awarded attorney's fees as the libellant here contends he is entitled to recover. This point was long ago decided by the Supreme Court of the United States in *Oelrichs v. Spain,* 15 Wall 211, and cited with approval in *Tullock v. Mulvane,* 184 U. S. 497, at page 512:

> "In debt, covenant, and assumpsit damages are recovered, but counsel fees are never included."

What libellant seeks, in effect, is to have the Court award him compensation for attorney's fees. As above set forth, such damages are not recoverable. The reasoning behind this ruling is stated by the Court in the *Oelrichs* case, *supra,* as follows:

> "The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality."

The ancient case of *The APOLLON,* 9 Wheat 373 (1824), cited by Petitioner as authority for the proposition that he is entitled to attorney fees as damages is no longer the law. Whatever discretion the admiralty court may have had in certain cases (it never had such

authority in cases such as this) was removed by the statute of February 26, 1853. Likewise, the case of *Sprague v. Ticonic Bank,* 307 U. S. 161 (1930) is totally inapplicable to the case at bar.

The cases cited by libellant as authority for the proposition that damages may be awarded for a failure to pay maintenance though no damages have been proved and cited on page 8 of petitioner's petition are totally inapplicable to the case at bar and do not, in fact, stand for this proposition which libellant propounds. In none of the cases cited was libellant awarded damages for the mere failure or refusal per se of owners to pay maintenance.

In *the TROY,* (W.D.N.Y.), 121 Fed. 901, the allowance was limited to living expenses and some compensation for suffering endured by the seaman by reason of not having care and attention as required under the circumstances of his case. But as Judge Hoffman found in this case:

> "There is no indication of any physical or mental suffering. . .".

In *Ran v. Atlantic Refining Co.,* 87 F. Supp. 853, it was only determined that the seaman's right of action for maintenance and cure arises on a day-to-day basis. No question of damages was presented in that opinion.

CONCLUSION

The petition of Clifford Vaughan seeking a writ of certiorari in this cause should be denied for the following reasons: (1) There is no basic conflict amongst the circuits as petitioner alleges relative to the two questions raised; (2) the issues raised in this case are peculiar to this particular case and are of no general importance and (3) the decision of the District Court below, upon the facts of this particular case, was correct.

Respectfully submitted

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Proctors for Respondents

APPENDIX

MEMORANDUM

FILED BY DISTRICT JUDGE HOFFMAN August 22, 1960, NUNC PRO TUNC AS OF NOVEMBER 5, 1959

The Libellant, an American seaman, served on the Respondent's vessel, the American Steamship "NATIONAL LIBERTY" from November 26, 1956, to March 2, 1957, when he was discharged from said vessel at Norfolk, Virginia, upon the termination of a voyage. On March 8, 1957 Libellant reported to the United States Public Health Service Hospital at Norfolk, Virginia, for examination and was admitted to that institution as an in-patient on March 18, 1957, for treatment for suspected tuberculosis. Libellant was discharged to an out-patient status on June 6, 1957, and remained an out-patient until August 25, 1959, when he was notified that he was discharged fit for duty as of August 19, 1959.

DAMAGES FOR FAILURE TO PAY MAINTENANCE AND CURE

The evidence in this case justifies a finding that the Respondent was derelict in its duty to pay maintenance. The Libellant had forwarded to the claims and insurance manager for National Shipping and Trading Corporation an abstract of his clinical record indicating that Libellant was admitted to the United States Public Health Service Hospital at Norfolk, Virginia, on March 18, 1957, and was discharged to an out-patient status on June 6, 1957. The records of the hospital reflect a strong probability of active tuberculosis. The only investigation conducted by the Respondent was to inter-

rogate the master and chief engineer, who states that the Libellant had never complained of any illness during his four months' service as a wiper on the SS "NATIONAL LIBERTY". It is admitted, however, that the Master furnished Libellant a certificate to enter the Public Health Service Hospital upon Libellant's discharge on March 2, 1957. Respondent made no effort to further investigate the status of Libellant's claim, and apparently did not even bother to admit or deny the validity of his claim for maintenance. Such action on the part of the Respondent would give rise to a claim for damages under *Cortes v. Baltimore Insular Line*, 287 U.S. 367, 371, providing that the failure to furnish maintenance has caused or aggravated an illness. In the present case, there is no evidence before the Court which would justify a finding that the failure to furnish maintenance caused or aggravated the illness. I have examined the authorities submitted by Proctor for the Libellant, including *The Troy*, 121 F. 901, 906; Ran v. Atlantic Refining Co., 87 F. Supp. 853; and Murphy v. American Barge Line Co., 3 Cir. 169 F. (2d) 61, 64. While there is some statement in *The Troy* which could possibly be construed as an allowance of damages for failure to pay maintenance, it is clear that such allowance was limited to living expenses and some compensation for the suffering which Libellant endured by reason of not having the care and attention for under the the circumstances of the case. Under the evidence before the Court at this time it appears that Libellant actually earned more during his out-patient status than he had earned before signing on the vessel. There is no indication of any physical or mental suffering and, in the absence of provable damages, no allowance can be made to the Libellant for this cause of action.

The evidence does show, and the Court finds, that Libellant was required to pay one-half of the amount recovered by way of maintenance to his proctor. This is undoubtedly a diminution of the total amount which should have been paid to Libellant, but this Court knows of no authority which would justify the reimbursement of counsel fees through the guise of an allowance for damages incident to the failure to pay maintenance.

For the foregoing reasons, the claim for damages for failure to pay maintenance will be dismissed.

THE CLAIM FOR MAINTENANCE

At the request of Libellant, the Court granted a hearing on a application for interlocutory decree to require the Respondent to pay the maintenance alleged to be due said Libellant. This hearing was held on February 25, 1959, and on May 12, 1959, the Court entered an interlocutory decree granting the Libellant maintenance at the rate of $8.00 per day as specified in his union contract for the period beginning June 6, 1957 (the date of his discharge from the hospital as an out-patient) to and including February 18, 1959, but provided that the total amount should be mitigated by the net amount earned by Libellant during said period while employed as the driver of a taxicab. The order further provided that Respondent would be required to continue the payment of maintenance at the rate of $56.00 per week, subject to a credit for any sums earned by Libellant by reason of his employment as aforesaid, until such time as the Libellant reached the maximum state of recovery. Libellant contends that no credit should be given by reason of Libellant's earnings during the time of his employment while an out-patient, but the weight

of the authority appears to indicate to the contrary. The Court adheres to its previous view that Respondent is entitled to a credit for the sums earned by Libellant while an out-patient. It should be noted that Libellant was allowed interest at the rate of 6% per annum for each week's maintenance which remained unpaid and, to this extent, the Respondent was obligated to pay for its neglect in observing its duty to provide maintenance.

Proctors have stated that maintenance has now been fully paid to and including August 19, 1959. Libellant contends that he is entitled to maintenance for an additional six days namely, August 20, 21, 22, 23, 24 and 25. The circumstances giving rise to this contention are that the Libellant was examined at the hospital on August 19, 1959, but was not then notified that he was fit for duty. He was instructed to report back to the hospital on August 25. When he reported on August 25, the hospital then notified him that he would be discharged as fit for duty as of August 19, 1959. In the opinion of the Court Libellant is entitled to the additional six days' maintenance, without interest, as Libellant remained an out-patient while under orders to report back on a specific date. Furthermore, the factual situation presented in this case clearly shows that the hospital had examined the Libellant on August 19, but had reached no conclusion as to his condition and the effect of the hospital's discharge as fit for duty was substantially one of relating it back to the date of the final examination. This ruling is not to suggest that a seaman must be officially notified when he is fit for duty, but if the seaman is directed to report back at a later date, presumably for a further examination, the seaman has

the right to assume that maintenance will be continued pending a final determination of his status.

Accordingly, a decree will be entered permitting the recovery of maintenance for the additional period of six days, less such sums as were earned by the Libellant in his employment as a taxi driver.

CAUSATION OF ORIGINAL ILLNESS

The evidence does not firmly establish that Libellant suffered from active tuberculosis, but he undoubtedly had a condition which required treatment.

There is no credible testimony in this case pointing to any connection between the illness of Libellant and the cause of same. There is no merit in Libellant's contention that there existed any violation of 46 U.S.C.A. Sec. 673, or any provisions of the union agreement. Assuming, without finding, that such violations did exist, there is no suggestion that the violations were associated with Libellant's condition. The cause of action alleging that the Respondent is liable for the illness is dismissed.

THE CLAIM FOR WAGES

It is admitted that Libellant was discharged and the voyage ended on March 2, 1957, at which time Libellant was paid his wages in full. He now contends that, as a matter of discretion, he is entitled to wages for a reasonable period after the termination of the voyage. He relies upon *The Michael Tracy*, 4 Cir., 295 F. 680. It is urged that this authority stands for the proposition that, in some cases, wages are allowed beyond the time of the termination of the voyage. A close analysis of this decision points to the fact that Libellant was allowed

maintenance which was the equivalent of wages. Nor is there any support to Libellant's contention in *Seville v. U.S.*, 9 Cir. 163 F. (2d) 296, 298, wherein it is stated that wages are payable "at least" so long as the voyage is continued. The matter is put to rest in *Farrell v. U. S.*, 2 Cir., 167 F. (2d) 781, in which the Court approves the allowance of wages to the end of the voyage. On certiorari to the United States Supreme Court, the majority of this Court held that the shipowner was obligated only for the voyage on which the ship was engaged when he signed on. See *Farrell v. U.S.*, 336 U.S. 511. The claim for wages covering a reasonable period after the termination of the voyage is disallowed.

Proctors may use the views of the Court in preparing the Findings of Fact and Conclusions of Law. Costs will be assessed against the Respondents.

/s/ WALTER E. HOFFMAN
United States District Judge

Norfolk, Virginia
Entered nunc pro tunc
as of November 5, 1959.
August 22, 1960

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FILED
DEC 19 1961
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 323

CLIFFORD VAUGHAN,
Petitioner,

VERSUS

N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as Owners and/or Operators of the American SS "NATIONAL LIBERTY,"

Respondents.

PETITIONER'S BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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CLIFFORD VAUGHAN,
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N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as Owners and/or Operators of the American SS "NATIONAL LIBERTY,"
Respondents.

PETITIONER'S BRIEF ON THE MERITS

I. OPINIONS OF THE COURTS BELOW

The Opinion of the United States District Court for the Eastern District of Virginia (R. 11-15) is reported at 1961 A. M. C. 2037. The Opinion of the United States Court of Appeals for the Fourth Circuit (R. 16-19) and dissenting Opinion of Chief Judge Simon E. Sobeloff (R. 20-29) are reported at 291 F. 2d 813 (1961).

II. JURISDICTION

The Judgment of the Court of Appeals for the Fourth Circuit was entered on June 6, 1961 (R. 29-30). The Peti-

tion for a Writ of Certiorari was filed on August 16, 1961, and was granted on October 23, 1961 (R. 30). The jurisdiction of this Court rests on 28 U. S. Code, § 1254 (1).

III. QUESTIONS PRESENTED

1. Where a recalcitrant shipowner without cause refuses to pay a sick seaman the $8.00 per day maintenance unconditionally due him under his Union Contract, and the seaman, although not fit for duty, obtains light employment as a taxi driver, is the shipowner entitled to gain an advantage from his wrong and have the earnings of the sick seaman credited against the $56.00 weekly maintenance otherwise due?

2. Where a shipowner for twenty-three (23) months callously refuses to pay maintenance to a sick seaman, until after the seaman is forced to go to the trouble and expense of instituting suit and obtaining Court decrees for his maintenance — can the shipowner escape paying any damages to the seaman, other than six per cent interest, merely because the seaman eventually gets well?

IV. STATEMENT OF THE CASE

The facts in this case are undisputed (R. 16) and are contained in Findings of Facts numbered 1 through 10 of the District Court (R. 6-8) and Final Judgment Order (R. 9-10).

The Petitioner, Clifford Vaughan, a merchant seaman, earning the monthly base rate of wages of $315.20 *and* found, became ill of pulmonary disease while employed aboard the American SS NATIONAL LIBERTY. Upon being discharged from the SS NATIONAL LIBERTY on March 2, 1957, Vaughan was furnished by the vessel's Master with a certificate to enter the U. S. Public Health Service Hospital, at Norfolk, Virginia. He was examined at the hospital on March 7, 1957 as an out-patient. On March 18, 1957, he entered the hospital as an in-patient and remained

there until June 6, 1957, at which time he was discharged to out-patient status. Vaughan was given treatment at said hospital as an out-patient from June 6, 1957 until August 19, 1959. He was instructed to report back on August 25, 1957, when he was notified that he was fit for sea duty.

Article II, Section 13, of Petitioner's union contract provides (R. 26, footnote 8):—

"When a member of the unlicensed personel is entitled to maintenance and cure under Maritime Law, he shall be paid maintenance at the rate of $8.00 per day for each day or part thereof of entitlement. The payments due hereunder shall be paid to the man weekly. This payment shall be made regardless of whether he has or has not retained an attorney, filed a claim for damages, or taken any other steps to that end and irrespective of any insurance arrangements in effect between the Company and any insurer."

On June 6, 1957, the day he was placed on out-patient status, Vaughan sent the shipowner a registered letter, enclosing an abstract of his medical record from the U. S. Public Health Service Hospital, at Norfolk, and requesting payment of maintenance. Receiving no payment on account of maintenance, he then obtained a light job driving a taxi, while still undergoing out-patient treatment.

On January 5, 1959, Petitioner filed his libel in the District Court below, claiming maintenance and cure until he reached maximum medical recovery from his illness, and damages. In his claim for damages, Petitioner alleged: first, that through the unseaworthiness of the vessel and the negligence of the Respondents, he had contracted a chest disease believed to be tuberculosis, and, second, that he was entitled to damages because of the failure of the shipowner to pay him maintenance.

The Trial Judge below in his decision (R. 11-15), 1961 A. M. C. 2037, held that Respondent shipowner was derelict in its duty to pay Petitioner maintenance (R. 12) and awarded Petitioner maintenance at the rate of $8.00 per day provided

in his Union Contract, mitigated, however, by the net amount earned by Petitioner as a taxi driver, while an out-patient of the U. S. Public Health Service Hospital, at Norfolk (R. 13-14). The District Court awarded Petitioner interest at six per cent on the amounts it found to be due him from June 6, 1957, through August 19, 1959[1], but otherwise refused to award any damages, although it found that he was required to engage counsel in order to collect any maintenance whatsoever and that counsel fees were undoubtedly a diminution of the total amount which should have been paid him (R. 13-14). The District Court further held that Petitioner's illness was not caused by the unseaworthiness of the vessel or the negligence of Respondents.

A majority of a three Judge Court of Appeals affirmed the action of the District Court (R. 16-19) on the basis of *Wilson* v. *United States*, 229 F. 2d 277 (2nd Cir., 1956) and *Perez* v. *Suwanee S. S. Co.*, 239 F. 2d 180 (2nd Cir., 1956), with the Chief Judge dissenting. In his dissent, Chief Judge Sobeloff pointed out the majority Opinion was in conflict, in principle, with the decision of the United States Court of Appeals for the Third Circuit in *Yates* v. *Dann*, 223 F. 2d 64 at page 67, (3rd Cir., 1955), affirming 124 F. Supp. 125 (D.C. Del., 1954) on this point, but reversing the case on other grounds, the decision of the United States Court of Appeals for the Third Circuit in *Jones* v. *Waterman S. S. Co.*, 155 F. 2d 992 (3rd Cir., 1946), and the decisions of the United States Court of Appeals for the Second Circuit in *Evans* v. *Schneider Transportation Company*, 250 F. 2d 710 (2nd Cir., 1957) and *Bradt* v. *United States*, 221 F. 2d 325 (2nd Cir., 1955).

---

1. The District Court awarded maintenance at $8.00 per day for the period March 7, 1957, through March 17, 1957, inclusive, and August 19, 1959, through August 25, 1959, inclusive, less "any sums earned by libellant during said period," *without interest*. (R. 9-10). Nothing was decreed for the period between March 2, 1957, through March 6, 1957.

V. ARGUMENT

POINT I. MAINTENANCE IS NOT DESIGNED TO RESTORE LOST EARNINGS. THE RIGHT TO MAINTENANCE SHOULD BE UNAFFECTED BY INCIDENTAL EARNINGS ASHORE WHILE THE SEAMAN IS A PATIENT UNDER TREATMENT, UNFIT TO DO SEAMAN'S WORK.

"Maintenance" is the value of the food and lodging due a seaman, who becomes sick or is injured in the service of the ship, while he is incapacitated to do seaman's work, and until he reaches maximum medical recovery.

> *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525 (1938); *Farrell* v. *United States*, 336 U. S. 511 (1949).

Distinction must be made between the concept of "maintenance" and the concept of "lost wages." "Lost wages" is an element of the damages recovered by the seaman if successful in a personal injury action against the shipowner. If, as here, the seaman does not prevail in his personal injury action (and does not therefore recover "lost wages"), there is no need to go into the question of "lost wages" at all and whatever the seaman might or might not earn is immaterial.

As pointed out by Chief Judge Sobeloff in his dissenting Opinion below (R. 25):

> **"The correct rule, I think, is to treat earnings during convalescence as wholly irrevelant, since Vaughan's right to maintenance and cure has been established in accordance with the governing Supreme Court decisions. See: *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525 (1938); *Farrell* v. *United States*, 336 U. S. 511 (1949). Here the earnings during convalescence should be treated as having no more relation to the right to maintenance and cure than the relief payments received by the seaman in another Second Circuit case, *Evans* v. *Schneider Transportation Company*, 250 F. 2d 710 (2nd Cir., 1957). This is not unlike the 'collateral source' rule recently applied by**

> us in *Price* v. *United States*, 288 F. 2d 448 (4th Cir., 1961), for Vaughan's earnings have no more to do with maintenance and are as collateral to maintenance as the civil service benefits were to damages in that case, or the insurance in *United States* v. *Brooks*, 176 F. 2d 482 (4th Cir., 1949). Whether an employer's breach of its duty to provide maintenance throws the seaman on public relief or forces him to work while ill and still in need of treatment, the employer should not gain an advantage from his wrong. *Maintenance is not designed to restore lost earnings*, and the right to maintenance should be unaffected by incidental earnings ashore while the sailor is a patient under treatment and unfit to do seaman's work.
>
> True, in a suit under the Jones Act only such wages may be recovered as the plaintiff has lost by reason of the injury, but this is not such a suit." (Emphasis supplied and footnotes omitted).

This is also the view of the Court of Appeals for the Third Circuit in the case of *Yates* v. *Dann*, 223 F. 2d 64, at page 67, (3rd Cir., 1955) where that Court (reversing the District Court on other grounds) expressly approved the holding of the District Court, (124 F. Supp. 125, 140 (D. C. Del., 1954), that a seaman is not be penalized where he had not been discharged as an out-patient and should have been receiving maintenance, but where the shipowner withheld maintenance payments and the seaman returned to work while still under out-patient treatment by the Public Health Service. Although earnings were permitted to mitigate the wages payable as part of his damage award, his right to maintenance and cure was held to continue during the period in which he, as an out-patient, was engaged in such work, undiminished by any earnings in that period.

Similarly, in *Jones* v. *Waterman S. S. Co.*, 155 F. 2d 992 (3rd Cir., 1946), an injured seaman was permitted to recover maintenance and cure from his employer, although in a previous action against a third party tortfeasor, which ended in settlement, he had sought to recover damages which included "substantially all the items recoverable by Jones as maintenance and cure and wages." 155 F. 2d at page 995. See also discussion at page 996.

In *Evans* v. *Schneider Transportation Company*, 250 F. 2d 710 at page 712 (2nd Cir., 1957), the United States Court of Appeals for the Second Circuit awarded the estate of a tubercular seaman full maintenance for a six month period during which the seaman had received municipal relief.

In *Bradt* v. *United States*, 221 F. 2d 325, at page 326 (2nd Cir., 1955), the Court of Appeals for the Second Circuit held that a tubercular seaman was entitled to full maintenance during the period he was attending a maritime school on a full time basis.

In *Hanson* v. *Reiss Steamship Co.*, 184 F. Supp. 545, 550 (D. C., Del., 1960), an injured seaman who had obtained employment on a fur farm while an out-patient was awarded maintenance for the period of such employment.

Thus the principle of mitigation of damages is not applicable. The instant seaman's recovery is solely for maintenance,[2] *not* wages, and except for the free food and lodging provided him in the U. S. Public Health Service Hospital, the shipowner is liable for these items.

Cf. 47 Virginia Law Review 1077, at pages 1082-1083, commenting on the decision below;

Also Cf. Norris, *The Law of Seamen*, Vol. 2, page 133.

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2. The principles applicable here appear to be similar to those involved in *Batchelor* v. *American Health Insurance Company*, 107 S. E. 2d 36 (1959). There the plaintiff was insured under ten different hospital expense policies and the insurer pointed to the fact that the plaintiff earned $65.00 per week, whereas if hospitalized, he would receive, under the various policies, $754.00 per week. The Supreme Court of South Carolina held that the plaintiff was entitled to the proceeds of the policies, although under the circumstances it was more profitable for him to become hospitalized than to be gainfully employed.

Similar reasoning has allowed seamen injured in bus accidents to recover full maintenance, although they had made recovery against the bus companies for full damages, including cost of medical care and maintenance. *Gaynor* v. *United States*, 90 F. Supp. 751 (E.D. Pa., 1950); Cf. *Gomes* v. *Eastern Gas & Fuel Associates*, 127 F. Supp. 435 (D.C. Mass., 1954).

The error of the majority Opinion of the Court of Appeals below is ably analyzed by Chief Judge Sobeloff in his dissent (R. 23-25):

> ". . . *Wilson* v. *United States*, 229 F. 2d 277 (2nd Cir., 1956), is different from our case. Wilson obtained work as a relief engineer on ships in port, doing much the same work he had done for the defendant. Unlike the *Wilson* case, there is no intimation here that Vaughan was fit for work on a vessel at anytime before August, 1959. Moreover, the language of the *Wilson* case, which is made the premise of the majority opinion that 'maintenance and cure lies on the borderline between 'contract' and 'quasi-contract' and is sufficiently contractual so that the seaman has the duty to mitigation damages' (sic) is in dire conflict with the opinion of Justice Cardozo in *Cortes* v. *Baltimore Insular Line*, 287 U. S. 367 (1932), and with the holding of the Third Circuit in *Sims* v. *United States of America War Shipping Adm'n.*, 186 F. 2d 972 (3rd Cir., 1951), cert. den. 342 U. S. 816, where Judge Goodrich said:
>
> > 'This obligation for maintenance and cure is, as Mr. Justice Cardozo says, 'imposed by the law itself as one annexed to the employment * * * . The duty * * * is one annexed by law to a relation, and annexed as an inseparable incident without heed to any expression of the will of the contracting parties.' Cortes v. Baltimore Insular Line, 1932, 287 U. S. 367, 371-372, 53 S. Ct. 173, 174, 77 L. Ed. 368. It is no more a contract than the obligation of a husband to support his wife is one of contract. Each arises out of a relationship voluntarily entered into. But these duties are imposed by the law as an incident to the relationship, not a matter of contract. We do not think, therefore, that the usual rules of damages for breach of contract to pay money are applicable.' 186 F. 2d at page 974.
>
> See also Gilmore and Black, The Law of Admiralty, page 257.
>
> The opinion of this court, like that of the court in *Wilson*, assumes that what is involved here is an ordinary contract, that the relief sought is damages for a breach of contract and that the rule of mitigating damages ap-

plies. This is at variance with the above language of Justice Cardozo speaking for the Supreme Court. The action for maintenance and cure is not one for damages. See *Pacific Co.* v. *Peterson*, 278 U. S. 130, 136-139 (1928). See also *Aguilar* v. *Standard Oil Co.*, 318 U. S. 724, 730-731 (1943).

The other Second Circuit case upon which the majority relies is *Perez* v. *Suwanee S. S. Co.*, 239 F. 2nd 180 (2nd Cir., 1956). There the Court sets off against maintenance a convalescing seaman's earnings from employment as a dishwasher, but ignores the dissimilarity of the work and the incapacity of the plaintiff to perform as a seaman—the features it had been at pains to point out in the *Wilson* case.

The theory of the Perez case is, I submit with deference, contrary to the spirit and doctrine of maintenance and cure which is deeply rooted in the admiralty law. See: *Harden* v. *Gordon*, 11 Fed. Cas. 480, Case No. 6,047 (C.C.D. Me., 1823); *Reed* v. *Canfield*, 20 Fed. Cas. 426, Case No. 11, 641 (C.C.D. Mass., 1832). Moreover, the course of decision in the Second Circuit strongly suggests that that Court has not yet spoken its final word on this point. See *Reardon* v. *California Tanker Company*, 260 F. 2d 369 (2nd Cir., 1958). . . . "

POINT II. WHERE A SHIPOWNER FOR TWENTY-THREE (23) MONTHS CALLOUSLY REFUSES TO PAY MAINTENANCE TO A SICK SEAMAN, FORCING THE SEAMAN TO GO TO THE TROUBLE AND EXPENSE OF INSTITUTING SUIT AND OBTAINING A COURT DECREE FOR HIS MAINTENANCE, THE SHIPOWNER CANNOT ESCAPE PAYING DAMAGES MERELY BECAUSE THE SEAMAN EVENTUALLY GETS WELL.

As Chief Judge Sobeloff noted in his dissenting Opinion below (R. 28):—

"He (the shipowner) should not be permitted and emboldened to act unilaterally, denying maintenance to

> one under treatment as an out-patient. If, despite his awareness that the right to maintenance exists, the employer elects to ignore his plain legal duty, the Court should not tell him that he may do so with impunity, even with possible gain. The shipowner is not entitled to assurance that if his pressure on the seaman fails the shipowner will suffer no disadvantage, while if it succeeds he will harvest the fruits of the sick man's labor though it may visit upon that man serious hardship short of demonstrated aggravation of the illness." (Words in parenthesis added).

It is submitted that failure to furnish maintenance when due gives rise to a cause of action in damages whether or not it is satisfactorily demonstrated that such failure aggravated the condition of the sick seaman.

The Troy, 121 F. 901, 906 (W.D. N.Y., 1902);
Ran v. *Atlantic Refining Co.*, 87 F. Supp. 853 (E.D. Pa., 1949).

In the instant case the Petitioner was forced to go to the trouble and expense of instituting suit and obtaining judgment before he could obtain one penny of the specific weekly maintenance due him, during a period extending over twenty-three (23) months. Petitioner should certainly be allowed as damages the amount he was required to pay for attorney's fees in order to recover at last the maintenance due him.

The Apollon, 9 Wheat. 373, 379 (1824);
Cf. *Sprague* v. *Ticonic Bank*, 307 U. S. 161 (1939), footnote 2;
American Jurisprudence, Vol. I, Admiralty § 139;
Also Cf. Footnote 3 of the dissenting Opinion below (R. 21-22).

VI. CONCLUSION

Concluding his dissent below, Chief Judge Sobeloff said (R. 28-29):

> "In summary, I find no sufficient warrant for a rule that rewards an owner's recalcitrance by automatically crediting him with earnings from part-time work ashore to which a sick man may be driven by the goad of hunger. Inevitably such a holding will serve as an inducement to owners, not only in doubtful cases, but even where, as here, no question was or could be raised as to the right to maintenance, to exert economic pressure on seamen to force them to work regardless of consequences to health. This could not be squared with what Justice Stone, citing many cases, called 'the liberality with which admiralty courts have traditionally interpreted rules devised for the benefit and protection of seamen who are its wards.' *Calmar S. S. Corp.* v. *Taylor*, 303 U. S. 525, 529 (1938).
>
> If the rule of *Yates* v. *Dann, supra*, enunciated by the Third Circuit, is considered defective in permitting a sick or injured man to retain sums he has earned during convalescence when maintenance was admittedly payable but not paid, it is certainly a lesser defect than that embodied in the competing rule of the Second Circuit, which by turning such earnings over to a defaulting employer who presents no excuse for his default, offers temptation to other employers to practice delay and harshness." (Footnotes omitted).

WHEREFORE, Petitioner respectfully prays that the Judgment of the Court of Appeals below be reversed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961

No. 323

CLIFFORD VAUGHAN,
Petitioner,

VERSUS

N. J. ATKINSON, a non-resident, individually, and as Master; NATIONAL SHIPPING & TRADING CORPORATION, and AMERICAN WATERWAYS CORPORATION, both foreign corporations, as Owners and/or Operators of the American SS "NATIONAL LIBERTY,"
Respondents.

RESPONDENT'S BRIEF ON THE MERITS

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

QUESTIONS PRESENTED

I. Is The Seaman's Right To Maintenance And Cure Sufficiently Contractual So That The Seaman Has The Equivalent Of The So-Called "Duty" To Mitigate Damages.

II. Where Shipowners' Failure To Pay Maintenance Has Neither Caused Or Aggravated Petitioner's Illness Is The Petitioner Entitled To Damages Other Than Interest On The Unpaid Maintenance.

STATEMENT OF THE CASE

The Statement of the Case contained in petitioner's brief is correct insofar as it goes. There are, however, other existing facts which are of importance and should, we feel, be brought to the attention of the Court.

The petitioner had never been to sea before he served on the SS NATIONAL LIBERTY from November 26, 1956 to March 2, 1957. Prior to signing on the SS NATIONAL LIBERTY, petitioner was engaged for many years as a taxi driver and owner of taxi cabs. On March 2, 1957, when petitioner signed off the NATIONAL LIBERTY, he did so at the end of a voyage and because the voyage had ended. He did not sign off on account of illness though he did obtain from the vessels' Master a certificate to permit him to be examined at the U. S. P. H. S. Hospital at Norfolk. This, however, is a common practice amongst seamen upon the completion of a voyage.

Though petitioner was examined initially at the U. S. P. H. S. Hospital at Norfolk on March 7, 1957, he was not admitted to that hospital until March 18, 1957, more than two weeks following his discharge from the SS NATIONAL LIBERTY. Upon being discharged to an out-patient status on June 6, 1957, petitioner forwarded to the shipowner's claims and insurance manager a certificate indicating he had entered the U. S. P. H. S. Hospital on March 18, 1957. Respondent shipowner was not advised that petitioner had been seen by the out-patient clinic of the Marine Hospital on March 7, 1957. Respondent then inquired of petitioner's superiors on board the SS NATIONAL

LIBERTY as to petitioner's illness, and was advised that petitioner had made no complaints during the four months he served on that vessel and that petitioner had been signed off the SS NATIONAL LIBERTY in normal course at the end of a voyage and not on account of sickness. In view of this investigation and in view of the apparent period of sixteen (16) days lapsing between the time petitioner signed off the SS NATIONAL LIBERTY and his admission to the U. S. P. H. S. Hospital at Norfolk, the respondent shipowner declined to pay any maintenance.

On June 6, 1957, the petitioner was discharged to an out-patient status from the U. S. P. H. S. Hospital at Norfolk at which time he was advised by his attending physician that he might engage in light work.

Though petitioner was discharged to an out-patient status on June 6, 1957, for some unexplained reason he did not see fit to employ counsel or in anyway further assert his claim for maintenance for a period of nearly a year and a half until January 1959.

On January 5, 1959, petitioner filed his libel in the District Court. On May 12, 1959, the District Court entered an interlocutory decree ordering the respondent shipowner to pay petitioner $8.00 per day plus interest at 6% for every day petitioner had been an out-patient less the amount of the wages earned by petitioner during the same period. The District Court further ordered that this formula should be adhered to in the future until such time as petitioner was fit for duty. The Court *did not* require petitioner to continue

to work. Notwithstanding the interlocutory decree of May 12, 1959, the petitioner continued to perform light duty as a taxi cab driver for the remainder of his out-patient treatment or for an additional period of over three months.

ARGUMENT

POINT I. THE SEAMAN'S RIGHT TO MAINTENANCE AND CURE IS A PART OF THE SEAMAN'S CONTRACT OF EMPLOYMENT.

In order that this Court might better evaluate the questions here presented, we will attempt to briefly review the ancient doctrine of maintenance and cure from its inception to modern times.

The doctrine of maintenance and cure is peculiar to the maritime law of nations. It has no analogy in the common law. Its exact origin is unknown. It is traced into antiquity through the laws of the maritime lands of the Mediterranean existing before the birth of Christ.

For centuries this basic and fundamental principle of the maritime law of nations, that a seaman injured in the service of his vessel was entitled to be cared for at the expense of the vessel and owner, remained unchanged. See *Article 6 of the Laws of Oleron; Article 19 of the Laws of Wisbuy; Old Hansent Ord. 39 and 45.* This doctrine was fully adopted and completely integrated into the early maritime laws of England. *2 Brown, Adm. 182-184.* The earliest learned discussion of maintenance and cure by our Admiralty Courts

in the United States is found in the opinion of Circuit Judge Story, delivered in *Harden v. Gordon, 11 Fed. Cas. 480,* handed own in 1823. However, as early as 1799 in the recorded opinion of District Judge Peters in *Swift v. The Happy Return,* 23 Fed. Case 560, fn 2, there is found a brief discussion of this doctrine. This ancient principle of the Maritime Law of Nations was accepted without modification by the Admiralty Courts of our newly formed United States. Though the doctrine of maintenance and cure had been discussed by many lower Federal Court following our national birth, it was not until 1903 that this Court in *The Osceola,* 189 U. S. 158, referred to this ancient doctrine in the following words:

> "* * * the vessel and her owners are liable, in case a seaman falls sick, or is wounded, in the service of the ship, to the extent of his maintenance and cure, and to his wages, at least so long as the voyage is continued."

A year later in 1904, this Court rendered its decision in *The Iroquois,* 194 U. S. 241. This latter decision in no way modified the basic doctrine of maintenance and cure but merely set forth the duty of a master of a vessel to put to the nearest port when a critically injured seaman was on board and further intimating that if the master failed in this duty and the seaman's condition suffered thereby, then the seaman might well have an additional cause of action for the physical injuries, if any resulting.

For the next twenty-nine years there was no significant pronouncement on the subject by this Court.

In 1932, Justice Cardoza delivered the opinion in *Cortes v. Baltimore Insular Line,* 287 U. S. 367. This opinion is notable, not in that it in any way changed the ancient doctrine of maintenance and cure, but rather, in that it stated in clear and precise terms this age old principle of maritime law. In *Cortes, supra.,* the seaman libellant contracted pneumonia and died while serving on respondent's vessel. The decedent's administrator charged that the master failed to give the seaman proper care. After reciting that a seaman has a right to recover for an unseaworthy condition, Justice Cordoza went on to say:

> "A remedy is his also if the injury has been suffered through breach of the duty to provide him with 'maintenance and cure'. The duty to make such provision is imposed by law itself as one annexed to the employment. The Osceola, 189 U. S. 158 47 L. Ed. 760, 23 S. Ct. 483, supra, Contractual it is in the sense that it has its source in a relation which is contractual in origin, but given the relation no agreement is competent to abrogate the incident. If the failure to give maintenance or cure has caused or aggravated an illness, the seaman has his right of action for the injury thus done to him, the recovery in such circumstances including not only necessary expenses, but also compensation for the hurt. *The Iroquois,* 194 U. S. 240, 48 L. Ed. 995, 24 S. Ct. 640, 16 AM. Neg. Reg. 638."

Justice Cardoza concluded, and rightly so, that if the failure of the master to furnish maintenance and cure:

> "has caused or aggravated an illness the seaman has his right of action for the injury thus done to him".

This proposition was recognized in *The Iroquois*, supra.

The other proposition, long recognized under the maritime law, but set forth by Justice Cardoza in *Cortez, supra* ,was that the right to maintenance and cure "has its source in a relation which is contractual in origin * * *" Again this was no new idea, but rather a well accepted principle of law recognized by our Admiralty Court as early as 1849. In the *Atlantic 2 Fed. Cas 121 (1849)* is found this statement of Judge Betts:

> "A fundamental doctrine applicable to mariners' contracts, and one regarded in Maritime law as forming a part of the contract, is the right of the seamen to be cured at the expense of the ship, of sickness or injury received in the ship's service."

The fact that the right to maintenance and cure has its origin in contract has been followed by lower admiralty courts in determining such matters as whether the tort or contract statute of limitations should apply by analogy where a plea of laches is made to a claim for maintenance and cure. (See *Cresci v. Std. Fisheries*, 7 F. 2d. 379 (D.C. Cal.), where contractual statute of limitation of California was applied by analogy).

In 1943 in *Aquilar v. Std. Oil of New Jersey*, 287 U. S. 367, this Court said, speaking of the obligation of the shipowner to provide maintenance and cure:

> "In the United States this obligation has been recognized consistently as an implied provision in contracts of marine employment."

POINT II. MAINTENANCE PAYMENTS DUE A SEAMAN WHILE AN OUT PATIENT SHOULD BE REDUCED BY ANY EARNINGS OF THE SEAMAN DURING THAT SAME PERIOD.

The pertinent portion of petitioners union contract relating to maintenance is set forth on page 3 of petitioner's brief. This provision merely sets a rate which shall be paid a seaman when he is *"entitled to maintenance and cure under Maritime Law."* The question then arises as to whether under the Maritime Law this amount should be reduced by wages earned by the seaman during the period he is entitled to maintenance and cure.

In *Johnson v. U. S.*, 333 U. S. 46, this Court held that under the Maritime Law a seaman who was living without cost to himself on his parent's ranch while an out-patient, was not entitled to maintenance payments. In affirming the two lower Court's denial of maintenance, Mr. Justice Douglas said, speaking for the majority:

> "* * * there is ample evidence to support the findings of the two lower courts that petitioner had incurred no expense or liability for his care and support at the home of his parents".

Though the *Johnson case, supra,* is not entirely in point, it does indicate that this Court recognizes the equity of reducing the vessel owners' liability for maintenance payments when to do otherwise would permit the seaman to reap a profit.

Perhaps the closest decision to the case at bar is the decision of the Second Circuit in *Wilson v. United*

States, 229 F. 2d 277 (C.A.2). In the *Wilson case, supra*, the Court allowed the seaman $8.00 per day for maintenance while an out-patient from the U. S. P. H. S. Hospital at Baltimore, Maryland, mitigated by whatever amount the seaman earned during the period he was an out-patient. For the days the seaman did not work he was allowed $8.00 per day just as the District Court awarded Vaughan in the case at bar. The basic principle behind the reasoning of Judges Hand, Medina and Frank of the Second Circuit in *Wilson, supra*, is found on page 281, wherein it is stated that the duty to furnish maintenance:

> "* * * is sufficiently contractual so that the seaman has the equivalent of the so-called duty to mitigate damages".

In *Perez v. Suwanee Steamship Co.*, 239 F. 2d 180 (C.A.2), at page 181, in a per curiam opinion rendered by Second Circuit Judges Hand, Medina and Lumbard, in connection with a seaman's award for maintenance, where the lower court failed to reduce the award by the amount earned by the seaman during the same period, the Court said:

> "We cannot, however, agree with the refusal to deduct from the award the wages earned by the plaintiff as dishwasher during the period of incapacity."

In *Diniero v. U. S. Lines*, 185 F. S. 818, affirmed 288 F. 2d 595 (C.A.2), where the libellant was covered by a collective bargaining agreement which set the rate of maintenance at $8.00 per day, the Court said after computing the total maintenance due at the rate of $8.00 per day:

"Of course, from that should be subtracted the wages that he earned."

In *Loverich v. Warner Co.*, 118 F. 2d 690, (C.A.3), the Third Circuit Court of Appeals in a similar case said:

> "The unit cost of maintenance in this case has been stipulated between the parties as $2.00 per day. The case is remanded with directions to enter judgment for the libellant at this rate as follows: From the period of his discharge to the present, excluding therefrom (a) periods when he was employed for wages by other employers and (b) periods when he was hospitalized under circumstances where he was under no expense."

See also *Bartholomew v. Universe Tankship, Inc.*, 279 F 2d 911, (C.A.2); *Rearden v. California Tanker Co.*, affirmed 258 F 2d [illegible], certiorari denied 359 U. S. 960; *Benton v. United Towing Co.*, 120 F. S. 638, affirmed 224 F 2d 558; *Stankiewica v. United Fruit S. S. Corp.*, 229 F 2d 580; *Williams v. U. S.*, 228 F 2d 129, certiorari denied 351 U. S. 986.

In the case at bar, the libellant was advised by his attending physician at the U. S. P. H. S. Hospital that he could perform light work while an out-patient.

The work performed by Vaughan during his out-patient treatment was that of a part time taxi driver in the City of Newport News, Virginia. It was an activity in which petitioner had engaged for most of his adult life prior to his two brief (and only) sea voyages on the SS NATIONAL LIBERTY.

It is, we believe, of considerable significance that even following the District Court's interlocutory decree of May 12, 1959, the libellant continued to work as a part time taxi driver, though he was not declared fit for duty until August 19, 1959, over three (3) months later. During this entire period, the vessel owner was promptly abiding by the aforementioned decree which awarded libellant $8.00 per day less his daily earnings as a taxi driver. The petitioner cannot possibly urge that during this period he was forced by economic necessity to work. This, we believe clearly shows that petitioner's working was a thing of his own choice.

In this case, the seaman was capable of performing light work without injury to his health. In fact, the performance of this light duty was undoubtedly most beneficial to his mental state of mind. If a seaman is able to work, it is only just and equitable that he should be required to mitigate the shipowner's maintenance cost. To hold otherwise would encourage an abuse of the right to maintenance granted seaman under the maritime law.

It should be remembered in this case also that the petitioner was at all times furnished adequate medical care while an out-patient at the U. S. P. H. S. Hospital at Norfolk. The only question here involved relates to the non payment of maintenance.

POINT III. WHERE FAILURE TO PAY MAINTENANCE DOES NOT AGGRAVATE SEAMAN'S ILLNESS THE SEAMAN IS NOT ENTITLED TO DAMAGES OTHER THAN INTEREST ON THE MAINTENANCE DUE AND OWING.

The petitioner retained counsel in this case on a fifty (50%) percent contingent contract. It is the petioner's position that he should be able to recover as an element of damage the fee he must pay his proctor.

We know of no authority which would support such a proposition. In fact, the authorities and logic itself are to the contrary. This point was long ago decided by this Court in *Oelrichs v. Spain,* 15 Wall 211, and cited with approval in *Tullock v. Mulvane,* 184 U. S. 497 at page 512, where the Court said:

> "In debt, covenant, and assumpsit damages are recovered, but counsel fees are never included."

The reasoning behind this ruling is an equitable one and is set forth by the Court in the *Oelrichs case, supra,* as follows:

> "The same rule is applied to the defendant, however unjust the litigation on the other side, and however large the expensa litis to which he may have been subjected. The parties in this respect are upon a footing of equality."

The proposition set forth on page 10 of petitioner's brief that a failure to furnish maintenance when due gives rise to a cause of action in damages whether or not it is satisfactorily demonstrated that such failure aggravated the petitioner's condition is in direct op-

position to this Court's holding in *Cortes v. Baltimore Insular Line, supra.* The four cases cited by petitioner in his brief at page 10 in support of this novel theory are all totally inapplicable.

In *The TROY,* 121 F 901, the allowance was limited to living expenses and some compensation for suffering endured by the seaman by reason of not having care and attention as required under the circumstances of his case. But as District Judge Hoffman found in the case at bar:

> "There is no indication of any physical or mental suffering."

In *Ran v. Atlantic Refining Co.,* 87 F. S. 853, it was only determined that the seaman's right of action for maintenance and cure arises on a day-to-day basis. No question of damages was presented or determined by the Court in that case.

In *The APOLLON,* 9 Wheat. 373, 379 (1824), cited as authority for the proposition that counsel's fee may be allowed in admiralty was overruled more than a century ago in *The MARGARET v. The CONNESTOGA,* 2 Wall Jr. 123, F. C. 9070. Furthermore, *The APOLLON, supra,* limited such recovery to cases of prize and seizure in admiralty.

Sprague v. TICONIC BANK, 307 U. S. 161 is inapplicable as it refers to the right of a petitioner bringing a class action to recover attorney's fees and cost from the fund recovered for the class as a result of the single petitioner's effort and expense. It does not involve the question of a plaintiff recovering attorney's

fees from a defendant in a simple two party contract or tort action.

CONCLUSION

(1) The seaman's right to maintenance arises out of his contract of employment.

(2) If the seaman is able to earn monies during his period of maintenance the basic maintenance to which the seaman is entitled should be reduced by the amount of these earnings.

(3) There is no authority for awarding a seaman attorney's fees in connection with a claim for maintenance.

WHEREFORE, respondent respectfully submits that the Judgment of the Court of Appeals below should be affirmed.

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